Supreme Court, U.S.
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84-1059

No. _____

In the

Supreme Court of the United States

October Term, 1984

PAUL M. FENNESSY, ET ANO.,

Petitioners,

against

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT INTERNATIONAL DAIRY QUEEN, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Cases: Page

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In re Yarn Processing Patent Validity Litigation,

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Top Value Meats, Inc. v. FTC,

586 F.2d 1275 (8th Cir. 1978) 2

Federal Rules

Rule 54 of the Fed. R. Civ. P. 2

Treatises:

6 Moore's Federal Practice,

¶ ¶ 54.34 & 54.35 (2d ed. 1983) 2

8 Wright, Miller & Kane, Federal Practice & Procedure

Civil 2d § 2660 (1983) . . . 2

QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit correctly rule that it lacked jurisdiction to hear petitioners' appeal?

SUMMARY OF ARGUMENT

Petitioners appealed to the United States Court of Appeals for the Second Circuit from a district court order dismissing their Complaint with prejudice. The district court never has dismissed or otherwise ruled upon the Counterclaim which has been asserted against petitioners, and did not direct the entry of a final judgment as to petitioners' claims. Consequently, as the court of appeals correctly ruled, there is no final order or judgment from which petitioners validly can appeal.

ARGUMENT

Petitioners Paul M. Fennessy and

Audrey E. Guthrie commenced this action against 97 defendants in the United States District Court for the Northern District of New York. One of these defendants has counterclaimed against petitioners.

After the service of the Complaint upon them, respondent International Dairy Queen, Inc., and several other defendants moved the district court for an order dismissing petitioners' Complaint. On March 15, 1984, the district court dismissed the Complaint as to all named defendants without prejudice. Neither at that time nor at any other time has the district court dismissed or otherwise ruled on the counterclaim against petitioners.

Petitioners appealed the district court's order of March 15, 1984, to the United States Court of Appeals for the Second Circuit. On October 15, 1984, the court of appeals dismissed peti-

tioners' appeal, ruling that it was "without jurisdiction to hear the appeal" because "an outstanding counterclaim has not been ruled upon and no certificate under Rule 54(b) [has] been filed." The appellate court's determination that it lacked jurisdiction to hear the appeal because no final judgment had been entered pursuant to Rule 54 clearly was correct. See, e.g., Boudeloche v. Tnemec Company, 693 F.2d 546, 547 (5th Cir. 1982); In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338 (11th Cir. 1982); Encoder Communications, Inc. v. Telegen, Inc., 654 F.2d 198 (2d Cir. 1981); Top Value Meats, Inc. v. FTC, 586 F.2d 1275 (8th Cir. 1978); 8 Wright, Miller & Kane, Federal Practice & Procedure Civil 2d § 2660 (1983); 6 Moore's Federal Practice ¶ 54.34[2.-2] & ¶ 54.35[1] (2d

ed. 1983).[1]

CONCLUSION

Petitioners improperly have argued the merits in this Court although the court of appeals lacked jurisdiction to hear petitioners' appeal from the district court's March 15 Order. Petitioners'

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[1] In their petition, petitioners never dispute that an outstanding counterclaim which prevents the entry of final judgment precludes the court of appeals from having jurisdiction to hear an appeal. Instead, petitioners cite two cases for the proposition (undisputed by respondent) that a pleading dismissed without prejudice can constitute an appealable order so long as it disposes of all issues before the court. Neither cited case in any way concerns multiple claims situations like the one at issue herein, which are covered by Rule 54(b) of the Fed. R. Civ. P.

petition for writ of certiorari should be denied.

Respectfully submitted,

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